Issues: Qualification – Discipline (counseling memo), and Work Conditions (employee/ supervisor conflict); Ruling Date: March 1, 2019; Ruling No. 2019-4854; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4854
March 1, 2019

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether his August 10, 2018 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about August 10, 2018, the grievant initiated a grievance alleging that two managers at his facility had engaged in "retaliatory acts" and "unfair treatment" directed at him after an incident in August 2016 relating to medical treatment for an offender. In particular, the grievant appears to challenge the agency's issuance of two Notices of Improvement Needed/Substandard Performance on June 19, 2018. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR. [1]

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4]

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[1] While this grievance was pending, the grievant went on an approved medical leave of absence. During his absence, the grievant was given the option of returning to work at his former facility or accepting a transfer to another work location. The grievant accepted the agency's offer of a transfer to another facility and returned to work on or about January 14, 2019.

[2] *See Grievance Procedure Manual* § 4.1.

[3] Va. Code § 2.2-3004(B).

[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, while grievances that allege retaliation may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Notices of Improvement Needed/Substandard Performance

In this case, the grievant appears to argue that the Notices of Improvement Needed/Substandard Performance issued to him on June 19, 2018 were a form of retaliation against him because of his actions in relation to an incident that occurred in August 2016 involving medical treatment for an offender.[8] In support of this position, the grievant contends that other employees have had work performance issues that have not been addressed with corrective action by facility management.

While the grievant's concerns are understandable, the Notices of Improvement Needed/Substandard Performance he has challenged here are a form of written counseling. They are not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Therefore, the grievant's claims relating to his receipt of the Notices of Improvement Needed/Substandard Performance do not qualify for a hearing.[10]

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[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] The Notices of Improvement Needed/Substandard Performance were issued to the grievant more than thirty calendar days preceding the initiation of the grievance. The agency appears to have addressed the grievant's arguments concerning the Notices of Improvement Needed/Substandard Performance during the management steps and, more importantly, did not raise a claim of initiation noncompliance before or in the agency head's qualification decision. *See Grievance Procedure Manual* § 6.2. Accordingly, EEDR considers any claim of timeliness noncompliance relating to the Notices of Improvement Needed/Substandard Performance waived. Moreover, and as discussed more fully below, management actions that are not timely challenged, such as the Notices of Improvement Needed/Substandard Performance in this case, may appropriately be presented and considered as background evidence in cases involving workplace harassment as part of the overall pattern of allegedly improper conduct.
[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[10] Although this issue does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that he wishes to challenge, correct, or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

While the two Notices of Improvement Needed/Substandard Performance have not had an adverse impact on the grievant's employment, they could be used later to support an adverse employment action against him. Should the Notices of Improvement Needed/Substandard Performance grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Hostile Work Environment

In addition, the grievant alleges that two agency managers have engaged in retaliation and/or harassment that have created a hostile work environment. For a claim of workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or protected activity[11]; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[12] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[13] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

As examples of the allegedly retaliatory and/or harassing behavior he has experienced, the grievant argues that one or both managers have required him to work multiple times when he was sick or injured; that, on at least two occasions, he was not relieved from work in a timely manner, or at all, after reporting an illness to the managers; that he has been required to complete incident reports and other paperwork, while other employees have not; that he has received several unwarranted counseling documents, including the two Notices of Improvement Needed/Substandard Performance discussed above; that one of the managers has threatened to terminate him; and that he has generally been treated differently than other employees. Having thoroughly reviewed the grievance record and the information provided by the parties, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or retaliatory hostile work environment. Though the grievant may reasonably disagree with the issuance of the Notices of Improvement Needed/Substandard

[11] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[13] *See generally id* at 142-43.
[14] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

Performance and other supervisory actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[15] In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[16] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[17]

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[15] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

[16] *See Grievance Procedure Manual* § 4.1. This ruling only determines that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to this claim, or whether the managers' allegedly unprofessional behavior could justify the issuance of corrective and/or disciplinary action by the agency. Indeed, it appears that some of the actions described by the grievant—in particular, the alleged failure of one or both of the managers to assist with providing coverage on the occasions when the grievant was sick and unable to work—may not have been consistent with agency policy relating to staffing and shift coverage arrangements.

[17] *See* Va. Code § 2.2-1202.1(5).